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TAVAZHI PROPERTY.

(*Continued from p. 29*).

The analogous case of the Hindu widow may be usefully considered in this connection. So long as the widow's claims are not fixed and she is residing with the family, she is presumed to acquiesce in the *bona fide* dealings by the family with the family property and the creditors are entitled to proceed against it irrespective of her claims but when once they become fixed, though even thereafter she may be entitled to participate in the improvement in family fortunes and may in certain circumstances be affected by an adverse turn in them, neither the family nor the creditors can affect her rights. The interests of the junior members of the Malabar family are no doubt proprietary unlike those of the widow and also unlike in the case of the widow, the family management even after the maintenance arrangement is in theory still conducted for his direct benefit. Giving due weight to these differences there still remains an element of similarity between the two cases and it would seem legitimate to hold that the property assigned would not ordinarily be liable for the family obligations which the branch in question has not joined in incurring. Apart from the analogy above indicated there are two ways in which this result can be legally deduced. (i) In the circumstances the authority of the Karnavan and the other members of the family must be restricted to dealing with the remaining property and any obligation incurred thereafter should be held not binding on the maintenance allotment, (ii) As between the family and members in question and consequently as between persons claiming through the family and the members in question so much property must be deemed to be taken out of the category of family property, disposable for the ordinary purposes of the family.

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In a recent case *Cheriya Pangi Achan* v. *Unnalachan*, [1] it is suggested that the courts cannot depose Karar managers when there is a *de jure* Karnavan though with powers cut down yet not altogether deprived of them. The ruling leaves unaffected the liability of managers of branches to be removed at the instance of the members of the branch for whose benefit the properties are assigned. Just as the Karnavan derives authority to deal with the tarwâd property from his natural position, the eldest member of the branch derives his authority to deal with the property assigned to his branch from his position as such eldest member and there is no reason in principle why the one should be liable to removal for mismanagement and not the other. Failure to recognise the possibility of a "co-parcenary within a co-parcenary" or to put it in the analogous Marumakkathayam terminology of a "tarwad within a tarwad" is responsible for much of the confusion in this branch of the law. The difficulty felt by Malabar Lawyers in grasping this simple idea was due to the late recognition in that system of the capacity of the Tavazhi to inherit property. It was finally recognised only in the Full Bench case in *Krishnan* v. *Damodaran* [2].

Another of the positions suggested in that case is that a family arrangement can be set aside without reference to court by a majority vote in the family council. Though this is extending the "corporation theory" of the family beyond the hitherto recognised limits, we do recognise that the rule as ordinarily stated that the karnavan cannot revoke family arrangements of his own authority but must resort to courts may require a re-statement. The rule really amounts to no more than this—that the family arrangement cannot be put an end to by a karnavan arbitrarily as he can concessions made by himself but he can do so only on the coming into existence of circumstances that make a revision essential in the interests of the family and he may be assisted by a majority vote in persuading the court that it is so. Another proposition laid down in the case is that the arrangement is good only for the life-time of the Karnavan who has agreed to be bound by it. But we think that this presumption ought to be confined to cases where the arrangement is made primarily for the better

1. (1916) 32 M. L. J. 323. 2. (1915) I. L. R. 38 M. 48.

management of the family lands. Where the arrangement is made with a view to more equitable enjoyment of the family lands or to provide for the maintenance of a branch, the presumption ought to be, we think, that the arrangement is intended to continue till a substantial change in the circumstances occurs.

Another type of property which a Tavazhi holds, as we said before, is inherited property. For a long time it was thought that in Malabar the Tarwad alone was entitled to inherit but this is no longer the law. In the case of women, their descendants inherit their property and hold it with the incidents of tarwad property. Under the allied system, the Aliyasantana Law of Canara, the self-acquisitions of individual members always descend on the Tavazhi in preference to the tarwad and the rule is, as stated in *Manjappa Ajri* v. *Marudevi Hengsu* [1], that the nearest Tavazhi succeeds — one's own Tavazhi, in default the mother's Tavazhi, in default, the grand mother's Tavazhi and so forth with rights of representation &c. This right of representation is an advance on anything known to the Hindu Law under which it is confined to property inherited from lineal male ascendants. Malabar is much under the spell of group succession and if the Tarwad is got rid of, it could only think of the next handy group the Tavazhi to succeed. That individuals can succeed is beyond doubt but that is only when there are no groups to succeed. What is to happen if the group that would normally have been entitled to succeed to a certain property is to be split up into several minor groups? All analogies point to the groups taking as tenants-in-common, each group however taking its share with incidents of tarwad property.

Another way in which the Tavazhi comes to own property is by gifts from father, or brother or uncle, for the matter of that gifts from anybody provided that it is intended that the gift is to enure for the benefit of the branch as such and not merely for the benefit of the individual members. The only difference between the gifts last named and others is that whereas there is generally a presumption in the former case (the extent of the presumption we shall presently consider) that the gift is intended to enure for the benefit of the branch, in other cases it must be made out to be so. The legal possibility of a gift to a branch with the incidents

1. (1915) I. L. R. 39 M. 12.

of tarwad property was once doubted but has since been affirmed in numerous cases. The question arose for the first time in *Narayanan* v. *Kannan* [1]. There there was gift by a father in favour of his wife and children and he expressly provided that the property should be held with the incidents of tarwad property. The High Court held that such a provision was invalid being repugnant to the grant. In *Kunhacha Umma* v. *Kutti Mammi Haji* [2], the Full Bench however overruled the case. In so doing it laid down two propositions : (i) when there is a gift by a father in favour of his wife and children, there is a presumption that the property is intended to be given to the branch (ii) that it is intended that it should be held with the incidents of Tarwad property. This decision was by some felt to be unsatisfactory and various attempts were made to get round it. One suggestion was that it applied only to cases where the branch relinquishes its interest in the Tarwad property and thereby becomes a tarwad by itself. *Kenath Puthen Vittil Tavazhi* v. *Narayanan* [3] and *Ammanga* v. *Appadorai* [4]. This was qualified later on into one that the Tavazhi must have been living separately. The reason given was that joint tenancy outside joint family was unknown and the only joint holding (apart from tenancy-in-common) known to the law was holding by the tarwad. We have already traced the genesis of this fallacy. It was also argued that the Tarwad Karnavan alone was the person bound to maintain the members and was the lawful guardian of the minor members and what, in those circumstances was to be the position of the Tawazhi Karnavan. Had he simply to draw the income and accumulate it or was he entitled like the tarwad Karnavan (as was said of him in some cases) to have un-controlled powers of disposition over the income? This doubt has since been set at rest by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker*, [5] which holds that the junior members are entitled to have maintenance from the branch property. We shall more fully develop this aspect of the case when considering the incidents of tarwad property that apply to this kind of property. Another and more substantial objection was that in the case of Marumakkathayam people the possibility of the wife taking another husband and having children by him must always be present to the mind of the donor

1. (1884) I. L. R. 7 M. 315.
2. (1892) I. L. R. 16 M. 201. (F. B.)
3. (1904) I. L. R. 28 M. 182.
4. (1909) I. L. R. 34 M. 387.
5. (1913) I. L. R. 39 M. 317.

and the intention of benefiting this latter cannot reasonably be expected of him but that would be the result if the property is taken by the branch as Tarwad property. The answer that may be given is that while the view that the branch is to take might occasionally give other people the benefit of the grant (who would certainly have it, even if the other view is taken, as descendants of the mother when succession opens out to the mother's share) the alternative view would almost always give an unfair preference to the children in existence at the time of the grant. Mr. Justice Sadasiva Aiyar makes a bold suggestion that sub-tavazhis consisting of a woman and her children by a particular husband might be recognised but so far it is only a suggestion thrown out and has not received much support though there is no reason why the hitherto accepted legal categories must be considered exhaustive. It was once thought as to easements that their number could not be added to; the Privy Council has told us that this is a wrong notion. Certain ideas were prevalent in England as to fishery rights in rivers &c. The Privy Council has deprecated the application of those ideas to the Indian physical conditions. It is an accepted idea in England that unincorporated bodies like a village or a community cannot hold property. This is not the view taken in India. There are many other directions in which what one should have thought were fundamental ideas of English jurisprudence have been held to be inapplicable to eastern conditions. On the whole we think it is more a question of usage than of positive legal theory. If, as a matter of fact, properties are held by such groups, there does not seem to be any insuperable barrier to giving effect to the usage. Though it may now be taken to be settled that a branch can take property with incidents of Tarwad property, there is considerable scope for doubt as to the exact circumstances in which the inference that the gift is one to the branch will arise, and as to the incidents of Tarwad property that will appropriately attach to such property when held to belong to the branch. Putting aside the case of a grant to a branch as such, and the case of a grant by a father to his wife and children merely or to wife and all the children then existing or after the death of the wife to all the children which is governed by the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker* [1] it can by no means to be said to be

1. (1916) I. L. R. 39 M. 317.

clear under what other circumstances the inference will be made. However, the inference has been drawn in a case where the gift was by the uncle to his nieces the mother being dead. (L. P. A. 19 of 16). Having regard to the usual origin of Tavazhi property from fathers, uncles and brothers as stated by Mr. Justice Sankaran Nair in *Chakkara Kannan* v. *Kunhi Pokker*[1] at p. 321, it would seem legitimate equally in all those cases to draw the inference. If the gift is to a sister and her children, the sister and her children will take as a branch; if it is to all the sisters, they will not take it as a tarwad unless at the time of their taking it, they are the sole members of the branch. However if it is clear that the sisters and their children are intended to take, the intention of the donor can be given effect to by taking the grant as a grant to the sisters as tenants-in-common but each sister to take her share as Tarwad property. The analogy of *Nagalingam* v. *Ramachandra Tevar*[2] would justify the raising of the inference in all cases in which the donees would in the absence of a gift in their favour take as heirs which under this system can only be with incidents of Tarwad property. It may be a question for consideration where a transfer is to all the members of the branch whether on the principle of Hindu Law that all *joint acquisition* of all members of the family is presumed to be family property, it should not be presumed *prima facie* to be property of the branch. Where the acquirers represent only one generation, the presumption may be weaker than when several generations join, though the presumption may arise notwithstanding that some do not join. Now suppose the gift is by the relations mentioned above but the gift is in the name of one or only some of the members of the branch then existing. What is to be the presumption? The law on this question is not quite settled though according to the Full Bench, when the gift is to wife and children, the conferring of the power of alienation &c., is an immaterial circumstance. As the question is one of construction of the grant with reference to the surrounding circumstances, if the words of the gift are clear that the gift is intended for the exclusive benefit of the donee, then the presumptions raised by the Full Bench are necessarily excluded and the donee will take absolutely. Similarly if the words are clear or from the surrounding circumstances the inference is clear that the grant is to the donee

1. (1915) I. L.R. 39 M. 317. 2. (1901) I.L. R. 24 M. 429.

as representing the branch then also, the presumption raised in some cases in favour of exclusive gift would not avail. Subsequent dealing with the property might undoubtedly be of use in determining whether the gift was made or accepted on behalf of the branch. Apart from all other circumstances, in the cases coming within the general rule, it seems to be a proper presumption to raise that when the gift is made to a person who ordinarily or in law represents the branch, he takes it on behalf of the branch and the presumption must be the more readily drawn when there is already property in his management as representative of the branch. In two cases, *Narasamma Hegadithi* v. *Billakesu Pujai* [1] *Dwija Bhandari* v. *Venku Bhandari* [2] it has been held that a gift to a wife alone (when there are children alive) must be taken to be to her absolutely, while in another case it is said that the fact that the transfer stands in the name of the eldest male and the eldest female might be an indication that the acquisition is intended for the branch, *Ammanga* v. *Appadorai Patter* [3]. If there were two gifts on the same day one in favour of the mother and another in favour of the eldest son the presumption would be that either the one or the other, preferably the latter was not intended for the branch, but if the interval between the two is long, the presumption is weak. *Naku Amma* v. *Raghava Menon* [4]. In one case, the fact that with the eldest male member, a junior male member was also joined was considered a circumstance for inferring that the branch was not intended to be benefitted. (A. S. 3 and 4 of 15.) In *Naku Amma* v. *Raghava Menon* [4] Mr. Justice Miller thought a gift to a woman *simpliciter* by the husband without words of alienation or inheritance was a strong circumstance in favour of the branch. In *Paru Amma* v. *Ittichti Amma* [5] Coutts Trotter and Srinivasa Aiyangar, JJ., thought that express grant of the power of alienation to the donee was conclusive in favour of exclusive gift to the donee. Applying the rule to Aliyasanthana cases, when the mother is alive (who is the *de jure* manager of the branch) a gift in favour of the eldest son ought not to be presumed to be for the benefit of the branch ordinarily and in the absence of evidence that he is managing other properties of the branch. It should be otherwise in a Malabar family where

1. (1913) 25 M. L. J. 637.
2. (1915) 31 I. C. 854.
3. (1910 I. L. R. 34 M. 387.
4. (1912) I. L. R. 38 M. 79.
5. (1915) 32 I. C. 459.

the eldest male represents the branch. It has been held that where the gift is to a woman, it is not essential that it must expressly purport to be for the benefit of herself and her children though it is possible that in the absence of such a statement when there are children in existence, the gift may be held to be hers exclusively.

The next question, which is not altogether settled is as to the incidents of tarwad property that can appropriately be held to attach to this type of property. The following incidents have been held to attach to the property: (i) impartibility and inalienability of individual member's shares, *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], *Chakkara Kannan* v. *Kunhi Pokker* [2], *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* [3], *Kunhamina* v. *Kunhambi* [4], (ii) Single management, *Abdulla* v. *Chekhotti* [5], *Parvati Kuttilammah* v. *Ramachandra Ejman* [6], (iii) Survivorship, *Korath Amman Kutti* v. *Perungothil Appu Nambiar* [7], *Chakkara Kannan* v. *Kunhi Pokker* [2], *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], (iv) Right of the members subsequently born, *Kalliani Amma* v. *Govinda Menon* [8], *Katankandi Koma* v. *Siva Sankaran* [9], (v) right of maintenance of junior members, *Naku Amma* v. *Raghava Menon* [10], *Chakkara Kannan* v. *Kunhi Pokker* [2], (vi) Liability of the managing members to be removed, *Parvati Kuttilammah* v. *Ramachandra Ejman* [6]. As regards maintenance though it has been decided that for the award of maintenance from the branch property, it is not necessary that the tarward should be unable to maintain the members, it is yet a doubtful question how far the ordinarily understood limitation on the right to maintenance, *viz.*, that the member should reside in the Tarwad house applies to the right to maintenance from the branch property. If that condition should be considered to inhere to the right of maintenance from the branch property, the very object one should think of such gifts would be frustrated for in the absence of some maintenance arrangement in the Tarwad the benefit of both properties can never be had by any member other than the

1. (1892) I. L. R 16 M. 201=2 M. L. J. 226. (F. B.)
2. (1913) I. L. R. 39 M. 317=29 M. L. J 418. (F. B.)
3. (1907) I. L R. 31 M. 228.
4. (1908) I. L. R. 32 M. 315.
5. (1910) 20 M. L. J. 368.
6. (1910) M. W. N 124.
7. (1906) I. L. R. 29 M. 322.
8. (1911) I. L. R. 35 M. 618.
9. (1910) 20 M. L. J. 134.
10. (1912) I. L. R. 38 M. 79.

manager. We should rather think that it is not a condition to the getting of maintenance from the branch property. Duty to reside in the family house is a duty cast on the junior member and he cannot be deprived of his right to maintenance for his due observance of his duty. Viewed from another point of view also the same result follows. In respect of conflicting rights and duties, the tarwad being the body of which the branch is only a part, the rights of the tarwad and the tarwad manager must have preference. If the right of guardianship inheres under the customary law in the Karnavan the branch karnavan cannot have it. Similarly, the right to regulate the movements of the junior members on which really the duty to reside in the family house hangs vests in the karnavan and the branch karnavan cannot have it unless it has been lawfully delegated by the karnavan. This is true not only of this type of property but also of maintenance arrangements for the branch though it would be different in the case of allotment to the branch of portions of family property more or less permanently for its enjoyment or management. It is again extremely doubtful if the rule as to non-accountability in its extreme form really applies to the branch manager in respect of these properties or in any other case when there has not been at least *pro tempore* in vesting of the branch manager with the Karnavanship in respect of the branch property. The duty and the right of the branch manager is only to manage the property. Non-accountability of the Karnavan even, is in truth but a fetish. What it really means is that he is not like a trustee liable to keep accounts and bound to justify every disposition by him. He has a large discretion in the utilisation of the family funds for purposes of the family subject to certain imperative duties such as maintaining the junior members &c.; as between the several purposes, he may starve one and favour another and he has also a large discretion in determining what is for the family benefit. He has to protect the members of family, look to their marriage and education and generally look to the religious and other interests of the family. With the range of duties that he has to perform and the discretion that he has in the selection of purposes and the amounts to be spent, taken with the rule that for mere carelessness, want of superior capacity or small lapses he will not be removed, in practice, he has large and uncontrolled powers,

Except in this way it is perfectly clear that he has no larger beneficial interest in the income than an ordinary member. It is now settled that he cannot use the family income for any purpose other than a family purpose. Coming to the case of a branch manager, owing to the smaller range of his duties, and the objects for which the fund in his charge can be applied, it may be his control, in practice, is less large though in strict theory there is no difference between the two cases.

The next point on which there is room for considerable doubt is as to the presumption as to acquisitions. The ordinary presumption is that the property standing in the name of a junior member is tarwad property. What is the presumption where the acquisition is in the name of a member of a branch which owns properties. ? Where the property is allotted to the branch for management by the tarwad, it is perfectly clear that the ordinary presumption would apply. If the property is assigned only for maintenance the presumption, one should fancy, is to be the other way for maintenance is a personal or individual right and the savings if any made by the member or the branch must be presumed to belong to the member or the branch rather than to the tarwad. Coming to the case of Putravakasam property, solution of the conflict of presumptions that must arise would be one of some nicety. The possible cases that might arise with respect to this are (i) as between the tarwad and the branch (ii) as between the tarwad and the individual members of the tarwad setting up branch title (iii) as between the branch and the individual members of the branch setting up self-acquisition (iv) as between the branch and its individual members setting up tarwad title. The first case is really analogous to the ordinary case of a dispute between a tarwad and an individual member uncomplicated by any question of branch. It is a case of self acquisition set up by the branch and it is for the branch to prove self-acquisition. It will have to prove a possible independent source of acquisition and non-user of the family funds. The presumption being one of fact, both or either of the circumstances might suffice to repel the inference If the branch has family property in its possession the burden would be heavier on the branch to prove self acquisition. The difficulty would really arise where the branch has not family property in possession but its manager has. In its ultimate analysis, the basis of the presumtion in favour of family property will be found

to be (i) possession of family funds (ii) capacity to throw into the common stock (iii) duty to account. In the case in hand, the second condition is not existing for itis not open to a single member though manager to giveup the rights of the junior members. Under these circumstances there should be no presumption either way and it should be for the party setting up the one or the other case to establish the case put forward by him. The second case again, is not much different from the case of a Tarwad and ordinary member. It is analogous to the case of a junior member owning self-acquisition setting up self-acquisition. In the third case, the burden should be on the junior member to show that it is his self-acquisition. Whatever difficulties there might be when there is a conflict between the tarwad and the branch, it is certainly for the junior member to show that the property is his self-acquisition but the fourth case is not quite so easy. This case is analogous to the first. Though where the conflict is between the branch and the tarwad, it may be that the burden would in some cases lie on the branch, and in some cases there would be no presumption, that is no reason why the individual members should take the benefit of that state of things when they do not represent the tarwad. It is for them to show out of which fund they got it, and in the absence of evidence, it is the more legitimate presumption that they acquired it out of the branch funds over which they have larger beneficial interest than out of the tarwad property; the presumption ought to be stronger when the member concerned is the manager of the branch. In some earlier cases, it was held that there was no presumption in favour of the branch unless the branch withdrew itself from the tarwad and lived separately. This was as a part of the general theory that the presumption of branch property with incidents of tarwad property would not arise unless those conditions applied; so far those cases are no longer law. But even under those conditions in *Mari Vittil Chathu Nair* v. *Mari Vittil Sekaran Nair* [1]. Sir Arnold White, C. J. and Krishnaswamy Aiyar, J. thought that where possession of tarwad funds was negatived, the acquisition by the manager of the branch is to be presumed to be that of the branch. The proposition as stated in the earlier cases, seems however to possess this valuable element of truth that where there is a separ-

1. (1909) I. L. R. 33 M 250.

ate residence of the branch and living as tarwad practically for all purposes, the presumption in favour of the branch should be more readily drawn than in the other cases.

SUMMARY OF ENGLISH CASES.

Hampton *v.* Glamorgan County Council: (1917) A. C. 13.

Contract—Construction—Cases relating to construction of similar contracts—Value of—Building contract—Construction—Specialist employed by contractor—Liability of building owner to specialist.

Per Earl Loreburn, Viscount Haldane and Lord Shaw of Dunfermline:—The facts of one case are hardly ever of any value when considering the facts of another case, and the same thing may be said in regard to the construction of one contract, which is rarely assisted by reference to the construction of other and different words. When the case goes upon the construction of a contract or upon a decision of fact, the main—and, broadly speaking the whole—value of a previous decision consists in looking at the point of view from which the learned Judge looks at the language, or looks at the evidence. The principle which must govern all similar cases must be taken and borne firmly in mind and in the light of that principle the contract in question must be read through.

Where under a building contract with a County Council the question was whether in employing a hot water engineer for the purposes of the contract the builder was acting as a principal or as the agent of the County Council and was liable for amounts payable to the engineer for work done by him and it appeared that the building was to be in accordance with the specifications and directions of the Council's architect for a lump sum, that the specification contained certain provisional items, including the following:—"Provide the sum of £ 450 for a low pressure heating apparatus"—, that the hot water engineer submitted a scheme to the architect and by the direction of the architect the scheme was accepted by the builder, and that during the progress of the work the engineer was paid by the builder a portion of the amount payable to him, *held* that the builder was the principal and that he, and not the County Council, was liable to the engineer.

Gray *v.* Lord Ashburton: (1917) A. C. 26.

Costs—Discretion of special tribunal established by Legislature and vested with the discretion—Interference by Courts —Principle—Distinction between such a case and case of discretion of judge of High Court—Court of appeal—Interference with discretion of Court below as to costs—Principle—Statute—Interpretation by analogy of other Acts—Propriety.

General words of discretion occurring in a statute which gives the commissioners or an arbitrator power to award costs are not to be cut down by importing limitations derived from the general law of England or any analogy between the position of an arbitrator and that of a judge. It is a case of a purely statutory proceeding and the Court cannot go outside the limits of the statute.

Where a statute provided that the costs of and incidental to an arbitration and award should be in the discretion of the arbitrator and that the arbitrator should, in awarding costs, take into consideration the reasonableness or the unreasonableness of the claim of either party, either in respect of amount or otherwise, *held* that, in the absence of an allegation of misconduct in a legal or any other sense against the arbitrator, his decision as to costs ought not to be interfered with.

Per Earl Loreburn:—There is nothing more to be deprecated than placing a gloss upon the quite simple language of an Act of Parliament by reference to other Acts which contain different language.

Per Viscount Haldane:—A Court of appeal will interfere and is always free to interfere with an order of the Court below as regards costs if it thinks that the trial judge has exercised his judicial discretion in a fashion that is not in accordance with settled principle.

Distinction between the case where a statute confers a discretion as regards costs on a special tribunal established by the legislature and the case of the discretion vested as regards the same matter in a judge of the High Court.

Admiralty Commissioners *v.* S. S. Amerika (1917) A. C. 38.

"Actio personalis etc"—Criticisms of—Observations on—Baker v. Bolton (1 Camp 493)—Decision that "in a Civil Court the death of a human being could not be complained of as an injury"—Origin

of rule—Correctness of—Damages—Mitigation—Duty of person injured—Voluntary payments made by injured person if can be recovered—House of Lords—Duty to administer Law as it finds.

The appeal arose out of an action for damage by collision instituted by the appellants, the commissioners for executing the office of Lord High Admiral of the United Kingdom, against the respondents, the owners of a steamship. The damage was alleged to have been caused by the respondent, steamship running into and sinking one of His Majesty's submarines. The appellants claimed as an item of damage the capitalized amount of the pensions payable by them to the relatives of the crew who were drowned as a result of the accident. Two points were argued before their Lordships (1) whether one person could under any circumstances recover damages for the death of another by reason of the negligence of a third party and (2) whether the particular damages claimed could be recovered. The decision of the first point depended upon the correctness or otherwise of the decision in *Baker* v. *Bolton* (1 Camp 493) to the effect that in a Civil Court the death of a human being could not be complained of as an injury. Their Lordships held that *Baker* v. *Bolton* was correctly decided and that the appellants' suit should be dismissed on that ground. On the 2nd point their Lordships held that the appellants were not entitled to recover the particular damages claimed because their grant did not form any part of the contract between the Admiralty and the seamen who were drowned and because the pensions might therefore have been granted or withheld at the discretion of the Admiralty.

Lords Parker and Sumner went further and held that even if the pensions had been granted pursuant to contract between the Admiralty and the deceased seamen the appellants could not have recovered the same.

Observations of Lords Parker and Sumner on the origin of the decision in *Baker* v. *Bolton.*

Per Earl Loreburn "When a rule has become inveterate from the earliest time, as this rule (rule in *Baker* v. *Bolton*) appears to have been it would be legislation pure and simple were we to disturb it."

Per Lord Parker: The House of Lords is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision.

No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased.

Per Lord Sumner: Observations on the criticisms of the maxim *actio personalis moritur cum persona.*

The Canton (1917) A. C. 102 J. C.

Privy Council—Special leave to appeal from order of President—Grant of—Conditions.

On a petition for special leave to appeal to His Majesty in Council from an order of the President of the Probate, Divorce, and Admiralty Division (in Prize), *held* that their Lordships could not advise an exercise of the prerogative unless they were of opinion that the Judge had proceeded on wrong principles, or had come to a conclusion which was obviously erroneous.

In re **Bede Steam Shipping Co. Ltd:** (1917) 1 Ch. 123.

Company—Directors—Transfer of Shares—Refusal to register—Arbitrary exercise of power—Interference by Court.

Under the Articles of Association of a registered Company, a registered holder was empowered to transfer all his shares subject to the power of the Directors to refuse to register transfers of shares if "in their opinion, it is contrary to the interests of the Company that the proposed transferee should be a member thereof."

Held, by *Lord Cozens-Hardy, M. R.* and *Warrington, L. J., Scrutton, L. J.,* dissentiente, that the power so vested in the Directors, justified a refusal to register only on grounds personal to the proposed transferee. It did not justify refusal to register transfers of single shares or shares in small numbers because the Directors thought it undesirable to increase the number of shareholders or that the transferee was the mere nominee of the transferor, the transfer having been made with a view to increase the number of share-holders who would support him in a policy which the Directors disapproved.

In re **Fletcher; Reading** *v.* **Fletcher:** (1917) 1 Ch. 147.

Merger—Lease for a term—Assignment of in favour of reversioners in fee—Intention to keep the term alive—Interest—Duty—Subsequent conduct, evidence of, inadmissible,

Where certain persons being entitled to certain property as reversioners in fee, took an assignment of a lease for a term to which the property was already subject and about nine months later mortgaged the term and the reversion separately.

Held, by *Astbury*, J., That, in the absence of any proof that it was the reversioner's interest or duty to keep the term alive at the date of the assignment, the subsequent mortgage was inrelevant as to their intention at that date.

The mere fact that merger would operate to prevent the reversioners from dealing with the term and the reversion separately would not constitute an interest against merger within the authorities, and there was a merger of the term in the reversion.

Meggeson *v.* **Groves**; (1917) 1 Ch. 158.

Lease—Construction—Date from which tenancy commences.

Where a tenancy is granted " from " March 25, the term commences at midnight on March 25.

Ackland v. *Lutley* [1].

Sidebotham v. *Holland* [2] followed.

In re **Gliddon** : **Smith** v. **Gliddon** (1917) 1 Ch. 174.

Will—Construction—Bequest of "all my moneys"—Residuary personal estate

A testatrix by her will bequeathed to her brother and her niece " all my moneys to be equally divided between them " and to the niece, " all my household furniture and personal effects." At the date of the will the testatrix had 32 £ at her bank and was possessed of furniture and effects to the extent of 20 sh. She was also entitled to a moiety of a reversionary interest in certain investments amounting to 2,430 £ subject to a mortgage for 750 £.

Held that the testatrix had used the words " all my moneys" in their ordinary legal sense and that the gift of them did not constitute a residuary bequest of her personal estate so as to pass the reversionary interest.

JOTTINGS AND CUTTINGS.

Fallen Trees on Highways.—His Honour Judge Wheeler took what seems the natural and reasonable view in *Hudson* v. *Bray* of the duties which our law imposes on the occupier of premises near a highway ; but on appeal the Divisional Court over-ruled him

1. (1839) 9 Ad. and E. 879. 2. (1895) 1 Q. B. 378.

(Dec. 12). A violent gale blew down a tree on land near a highway and caused it to lie across the road. The owner knew of the obstruction to the highway thus caused, but left the tree unattended and unlighted, with the result that a motor car ran into it at night and suffered damage. Now, the doctrine in *Fletcher* v. *Rylands* (L. R. 1, Ex. 280) which imposes the duty of keeping any dangerous thing at one's own peril if one brings it on one's land hardly applies to a tree growing in the ordinary course of nature; but if it does, still a violent gale is *vis major* and excuses the owner from liability. Thus the occupier of the premises is not liable for the quasi-trespass on the highway committed by his fallen tree. But if he, after notice, allows it to remain there, is he not guilty of obstructing the highway just as if he left his carriage unattended there? This seems plausible, but the answer seems to be that the Highways Act, 1835, contemplates the occurrence of such cases and provides a scheme of duties which ousts the common law. Under S. 25 of the Act it is the duty of the road authority to remove the obstruction, although under S. 65 steps may be taken to impose the cost of removal on the owner of the tree. Lastly, it is arguable that there is a common law duty on any owner of property on the highway to take reasonable care that it shall not injure the public at large; and here the reasonable thing was to place a light on the tree. This view His Honour took, and it is difficult to see any real answer to it. But the Divisional Court held that there can be no duty of this kind unless the owner of the tree has failed to remove or guard it after notice from the Surveyor of Highways, on the principle laid down in *Gully* v. *Smith* (12 Q. B. D. 121). In the opinion of that Court, therefore, the owner was absolved from liability for the injury to the car.—*The Law Journal, 13th December* 1916.

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Marriage and Expulsion Orders. The London Quarter Sessions quashed in *Rex* v. *Rance* (January 30) a magisterial conviction which took place in a rather exceptional set of circumstances The appellant was a German girl who omitted to register under the Aliens Restriction Order, with the result that a deportation order was made against her. Before the date fixed in the order expired she married an Englishman, and thereby acquired British nationality. Of course, there is no jurisdiction to make such an order against British subjects, and

she therefore treated the order as having been revoked by marriage. She was tried summarily for disobeying it, convicted, and sentenced to a term of imprisonment. This conviction Quarter Sessions upset on appeal, holding that on ceasing to be an alien the defendant was no longer bound to obey the order.—*The Law Journal, 3rd February* 1917.

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The Privilege of an Advocate. We hope the representative bodies of the profession, in England as well as Ireland, will carefully consider the decision of the Court-martial in Dublin, by which Mr. Moran, a Limerick solicitor, has been sentenced to six months' imprisonment for having, in defending a prisoner, published in open court, contrary, as it was alleged, to the Defence of the Realm Regulations, some confidential document issued by the Royal Irish Constabulary. It would seem that the original charge against Mr. Moran, which was that of refusing to disclose how he obtained the documents, was not persisted in. What, therefore, the finding of the Court-martial amounts to is that an advocate who makes use of a confidential document which he regards as relevant to the defence of a client against whom a criminal charge is brought is himself guilty of a criminal offence under the Defence of the Realm Regulations. That is a conclusion so contrary to the rules of justice and the traditions of the profession that it ought not to remain unchallenged. The privilege of an advocate is absolutely destroyed if he is not free to utilise a document that is relevant to the issue before the Court, and the interests of justice, on which alone that privilege is based, must inevitably suffer if such a restriction is imposed on the traditional rights of the advocate.

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Pleadings in Libel Actions. An important point in practice which has for some time been regarded as doubtful was settled by Mr. Justice Shearman last week in the libel action of *Smith* v. *Lewis* (February 2), in which the real issue between the parties was one of express malice, the question being whether this was raised by the pleadings. Following the usual form, the statement of claim alleged that the defendant had 'falsely and maliciously' written and published the words complained of; the defendant pleaded privileged occasion; and on this issue the case went to trial, no reply being delivered by the plaintiff. It was

contended for the defendant that the issue of express malice was not raised, the allegation in the statement of claim being merely formal. It is an old grievance with experienced pleaders that the worlds 'falsely and maliciously' should ever have been introduced into libel claims. 'Defamation,' says Mr. Spencer Bower in a note to his Code, 'is wrongful and actionable, just as trespass, assault, conversion or detinue is, unless and until any legal excuse is shown'; and why it should have been considered necessary to attach the meaningless epithet 'malicious' to a libel any more than to any other actionable wrong of which malice is not a necessary ingredient is to this learned writer 'beyond comprehension.' The use of the words, however, having become inveterate, judges have been accustomed to give effect to them in contested cases of privilege by not requiring any fresh averment of 'malice' but doubt has been thrown on this convenient practice by some who have been attached to the distinction between 'malice in law' and 'malice in fact.' Lord Justice Vaughan Williams gave his support to the maintenance of the distinction in pleading by his judgment in *Dawson* v. *Dover Chronicle* [1913], and the *Annual Practice* has been doubtful in its comments on the practice (compare the notes on pp. 364 and 419, Ed. 1917). Mr. Justice Shearman has now adopted the common-sense view that, there being an allegation of malice in the claim, and a plea to this of privilege, the issue was defined, 'because by the defence of privilege the allegation of malice in the statement of claim became not merely a nominal but an effective issue.' That ought to settle the practice.

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'Provisions' and Covenants. Any words in a lease which show an agreement to do a thing make a covenant, even though the words from which the intention to agree is inferred occur in some other provision or recital. But it must be clear that the words are meant to operate as an agreement, and not merely as words of condition or qualification, and in Comyn's Digest an instance is given of a covenant by a lessee to repair, 'provided that the lessee finds the timber,' as not creating a covenant by the lessor to find the timber. It has long been regarded as settled law that where the thing to be done precedes the obligation to perform a covenant by the lessee it should generally be construed only as a qualification of the lessee's covenant, but

where the thing to be done is to succeed the performance of the covenant it should be construed as an independent covenant by the lessor. So it has been laid down in Rolls' Abridgment, and in Viner, Bacon and the leading text books. But a valiant attempt to upset these authorities was made last week in *Westcott* v. *Hahn* (February 2) where the Divisional Court was asked to declare, on a special case stated under S. 19 of the Arbitrators Act, that an obligation on the part of a landlord of farm premises to supply material for repairs undertaken by the tenant at his own instance, was created by a covenant by the tenant 'from time to time during the term at his own cost (being allowed all necessary materials for this purpose, to be previously approved by the lessor) when and so often as need shall require to well and substantially repair' the farm buildings. The Court decided, after some hesitation (Coleridge, J., dissenting), that the intention here was not to create a covenant by the lessor, but only to impose a qualification on the lessee's covenant. The effect of the provision was in fact that the obligation to repair laid on the tenant could not be enforced unless and until the landlord himself provided the agreed materials, but that was not the same thing as putting an independent obligation on the landlord to be enforced at the tenant's instance. And so the case was remitted to the arbitrator with the opinion of the majority of the Court in favour of the landlord.—*The Law Journal, 10th February, 1917*.

CONTEMPORARY LEGAL LITERATURE.

A writer in the American Law Review (*November-December*) discussing the ways and means of improving the American judiciary without having recourse to the drastic remedy of "Judicial recall" states the following as the abuses in the Judicial System of America which have called forth the suggestion of that remedy, (i) Judicial corruption (not direct corruption but the indirect one of accepting favours from corporations such as free passes for railway journey &c.); (ii) bias in favour of certain interests, (iii) political bias (discretionary orders are obtained on occasions on account of this or that man appearing to whom the judge owes politically), (iv) judicial ignorance which is in a large measure responsible for appeals (v) discourtesy to the bar, (vi) the law's delay, (vii) Judicial misconduct in the trial of cases (due to confidence in their own judgment and the consequent attempt by all possible means to

make the jury return the verdict they think proper), (viii) abuse of Judicial discretion (on account of bias in favour of certain persons). In America some judges seem to be given to having secret conferences with attorneys of one side in the absence of the other side attorney. This he thinks should be avoided by all means if the judges care for their fair name, The class preferences can be avoided by taking care to select people with really judicial temperament. To avoid political judges, the remedy suggested is that the judges should be appointed by the executive subject to the approval of their state or local bar association and the appointment should be for a term. The judicial ignorance is due to the system of election which brings up occasionally people who are totally unfit. His suggestion to avoid delay is to cut short the number of appeals. He is for increasing the number of judges if necessary so as to ensure confidence and to give no more than one appeal one of the most essential things according to him is to keep the judges out of politics. Another writer considers the application of the Roman doctrine of *desuetudo* in the American Law that is to say the right of the judges to disregard a particular law as obsolete. At least one judge had the boldness to declare that a particular law had become obsolete and so to disregard it (the law in question was as to "benefit of the clergy.")

Another very interesting article deals with the German lawyers and German courts. The following are some of the peculiar features of that system. First, the judges are not recruited from the Bar. At the beginning of his career, a lawyer has to make up his mind whether to follow the judicial or the lawyer's career and he cannot change in the middle. The judges as a rule receive very low salaries. £ 300 is considered very good salary for very many judges. There is not the system of briefs or of short and concise pleadings. Pleadings are in fact like the opening speech of counsel. The trial is always by instalment. Preparation of cases is not left to counsel to anything like the same degree as under the English system. Before a subpoena is issued application must be made to the court and *prima facie* case of relevancy must be made out; if this is accomplished the points upon which it is proposed to have the witnesses examined must be formulated and submitted to the Court for approval. In the midst of the trial of a cause, such applications will be heard to the great detriment of orderly procedure. Under the German system, examination of witnesses

is entirely in the hands of the judge; there is no cross-examination by counsel. In the lower courts where petty cases are tried, pleaders are not allowed while the opposite rule prevails in the Higher Courts where parties can appear only by pleaders. In the history of German procedure, there was a period in which the experiment of entirely doing away with the lawyers was tried but being found to be a failure, the modern system was adopted. Pleaders have to produce powers of attorney before they can appear. A successful party gets all his costs from his adversary, not as under the English system only a portion of it; provided of course, they are not unreasonable. one peculiar feature connected with the Bar is that certain pleaders are attached to each court, and they alone can appear in that court; the pleaders of one court cannot appear in another. As a result, fancy retainers are not one generally possible.

In the *Harvard Law Review* for January, 1917 Mr. Roscoe Pound continues his discussion about "the end of law as developed in juristic thought." His present article is devoted to the developments in the 19th century. A characteristic juristic achievement of the 19th century according to him is the setting off of jurisprudence as a separate science and the idea of justice as the maximum of individual self assertion which begins to appear at the end of the sixteenth century reached its highest development. Whereas the main current of nineteenth century thought opposed society and individual and was troubled to reconcil Government and liberty, a new group of thinkers seek individual liberty through collective action and call for the maximum of Government control as the means of a maximum of liberty which mark the beginning of a transition to a new conception of the end of the law. In another article of interest, Professer Jeremiah Smith suggests a three-fold classification of obligations into (i) contract, (ii) tort, and (iii) absoulte liability instead of the customary division into contracts and torts and would restrict the term torts to cases where the liabillty is due to some fault.

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